

FILED

OCT 12 1989

**JOSEPH F. SPANIOL, JR.
CLERK**

(3)

NO. 89-306

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Malcolm T. Riley, III, Petitioner

vs.

United Parcel Service, Respondent

REPLY BRIEF TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
ON BEHALF OF PETITIONER
MALCOLM T. RILEY, III, pro se

Malcolm T. Riley, III, pro se
12 Stalwart Drive
Newark, Delaware 19713



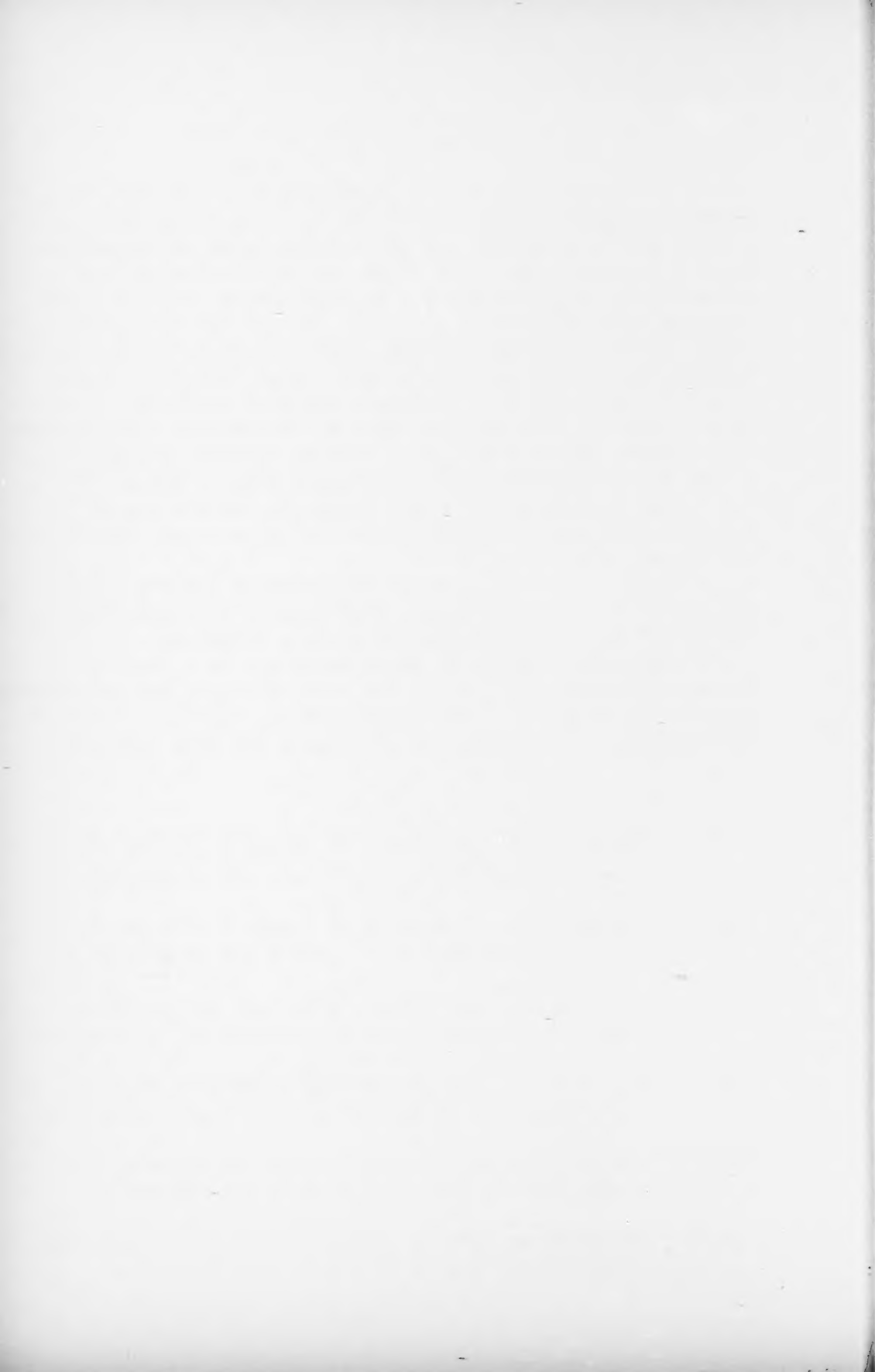
It wasn't until I appealed my denial of unemployment benefits case to the Superior Court of the State of Delaware that a Superior Court Judge took the time to understand the specific circumstances surrounding all of the issues and correctly found in my favor. At that time, the specifics surrounding my unlawful discharge were articulated in a fashion that clearly showed the pettiness and pretext that UPS used to set me up for an unlawful discharge.

Now, more than six years later, I again have to go before the highest Court in order to have discerning eyes examine issues and facts so that an accurate decision can again be made.

Specifically, this Honorable Court must be able to see through the smoke screen that Counsel for the Respondent has created.

Counsel for the Respondent, Mr. Martin Wald is nothing, if he is not adroit at skirting the true issues. He repeatedly "manufactures" testimony that appears nowhere in the record.

-
- "A" refers to appendix A that I filed in
 the Third Circuit Court of Appeals.
- "B" refers to appendix B that I filed in
 the Third Circuit Court of Appeals
- "OB" refers to my opening brief in appeal
 to the Third Circuit Court of Appeals.
- "AP" refers to the Appellee's Brief filed
 in the Third Circuit Court of Appeals
- "RB" refers to my reply brief in appeal to
 the Third Circuit Court of Appeals
- "BIO" refers to UPS's Brief in Opposition to
 Petition for a Writ of Certiorari



In the Respondent's Brief in Opposition, Mr Wald has again:

- a.) refused to address issues raised in my petition.
- b.) used "facts" that are unfounded and not true by concurring with Judge Joseph J. Farnan's inaccurate finding of fact.
- c.) referred to and used innacurate information to formulate conclusions in an innocuous, sarcastic manner.

Mr. Wald repeatedly downplayed substantiated fact and tried to strip pertinent issues of their credibility because they are detrimental to his position.

Unlike Mr. Wald, I will address every issue that he presents in his brief. Then I will re-address every issue that Mr. Wald chose to ignore. I will also demonstrate how Mr. Wald intentionally misinterprets law i.e. the "but for" test. On more than one occasion, Mr. Wald states that "race must be the determining factor" in a case such as this. In actuality, race only need be "a determining factor".

On page one of Mr. Wald's brief, he refers to procedural history. What Mr. Wald fails to reveal is that after I wrote to the Director of the EEOC, my case was re-opened "due to the totality of information now available". The information about which this statement refers are specifics that I brought up to the EEOC after they initially issued a no probable cause finding. (A-106 through A-109). In this document, I pointed out how incomplete the information base upon which the Delaware Human Relations Commission used to draw conclusion was, how uninformed the investigators were, and what additional questions had to be asked so that



all facts were exposed. What Mr. Wald "forgets" to mention is that the additional information that the EEOC requested of Mr. Wald and UPS was intentionally sanitized. (see the bottom of page 10 through page 12 of OB and A-78). After this case was at the District Court level of investigation, the information that the EEOC requested mysteriously reappeared (A-43 through A-52). Mr. Wald again refuses to respond to this issue.

On page two of Mr. Wald's Brief, he refers to the fact that Third Circuit Judge Joseph J. Farnan issued a Memorandum Opinion. Mr. Wald and the Third Circuit Court of Appeals ignored fifteen pages of rigorous, direct contest of what was considered finding of fact (see OB pages 1-15).

On page three of Mr. Wald's document to this Court, he attempts to mislead this Court by oversimplification of facts, making mention of issues that are not fact and never were facts, and he refers to numerous warnings that I had no knowledge of until years after my unlawful discharge from UPS. I was never a full-time employee, (see page 5, OB), I never received 48 warnings concerning anything (see OB, pages 8 and 9). Mr. Wald and Judge Farnan both refer to this number 48 as disciplines --however this number included a substantial number of other documents such as safe work method evaluations, sorting tests, and general employee-employer bi-annual meetings. Also, THE NUMBER 48 INCLUDES TWO AND THREE "write-ups" CONCERNING THE SAME INSTANCE!!!! (see A-43 through A-51, A-56 through A-59, A-31, A-32, A-233 lines 24 and 25, and A-234 lines 1-11).

Inspection of pages A-47, A-63, A-250 lines 13 and 14 and A-307 will show four different supervisors instructing me to perform the same task in four distinctly different ways. Again, with Mr. Wald's misleading style, he has



oversimplified this data as me being "confused about how to capably sort packages". Yet in Mr. Wald's words, supervision levies "write-ups" and "discipline" uniformly. AGAIN, MR. WALD INTENTIONALLY MISLEADS THIS MOST HONORABLE COURT!!!!!!

I have pointed this and other issues out to Mr. Wald and the Third Circuit Court of Appeals and they seem to ignore these blatant facts. Mr. Wald continues to refer to data that he knows is not fact.

On page 4 of Mr. Wald's document, the credible witnesses to whom he refers contradict the word credible. One of his witnesses who helped me out of a tractor-trailer after a chemical spill doesn't even remember any spill--one that he, in actuality, witnessed on two separate occasions. Another witness claims to have never witnessed anyone ever throwing a package other than me. It is uncontradicted that package throwing was a part of the business and went on everyday and was done by everyone. Another witness never saw anyone ever throw packages.

On page five of the BIO, Mr. Wald mentions several alleged violations of work rules. I have thoroughly addressed all of these issues in my appeal. (see pages 15 through 19, OB). On this same page (page 5, BIO), Mr. Wald refers to the famous letter of February 25, 1982, the Respondent's most pivotal, illegitimate citing of discipline. (RB, page 24 and 25). The specifics of this letter have been mentioned on a multitude of occasions (pages A-107 and A-108, OB pages 17 through 21, RB page 4). The only person to acknowledge this is Superior Court Justice Vincent J. Poppiti. This final warning is critical to UPS's "articulated business reason for discharge" even though it cites issues as progressive that had not ever occurred. HERE, IS WHEN UPS HAD TO ACT IMMEDIATELY IN ORDER TO HAVE ANY CHANCE TO



GET RID OF ME. AS I SAID ON NUMEROUS OCCASIONS, ONE EXCUSED ABSENCE WITH A DOCTOR'S EXCUSE, ONE LATENESS BY A MATTER OF TWO MINUTES THROUGH NO FAULT OF MY OWN, AND AN UNWARRANTED, UNJUSTIFIED CITING OF MISSORTED PACKAGES that could not even be definitely linked to me do not separately or cumulatively constitute anything but pretext. As is obvious, the numbers 14 and 7 as far as a problem number of missorts and as far as being outside of attainable company standards is ridiculous. (please thoroughly read page 20, 0B). By admission of UPS officials, 95% -98% accuracy is a corporate standard.(A-199 lines 1 through 5). How can someone cite anyone for a minimal number of missorts well below this standard in conjunction with the large number of incorrect zip codes that come through the system on a daily basis unless pretext is first and foremost?????

How is anyone going to perform and succeed at a job when there are several people at any given time putting their heads together just looking for something--however trivial--that they can document as a "set-up" for discharge on twisted, phony, untrue grounds?

In a nutshell, as has been articulated on record since the inception of this lawsuit, UPS showed obvious pretext when they unlawfully discharged me knowing all along that their statute of limitation would expire if they did not make a move for discharge within the next two weeks of my employment. (see A-21).

The crux of this matter -- aside from the fact that most of the data contained in my personnel file should not have even been there-- is that my personnel record was clean for the last eight and one-half months of my employment barring the disputed letter of February 25, 1982. This letter did not refer to anything that I had ever been disciplined

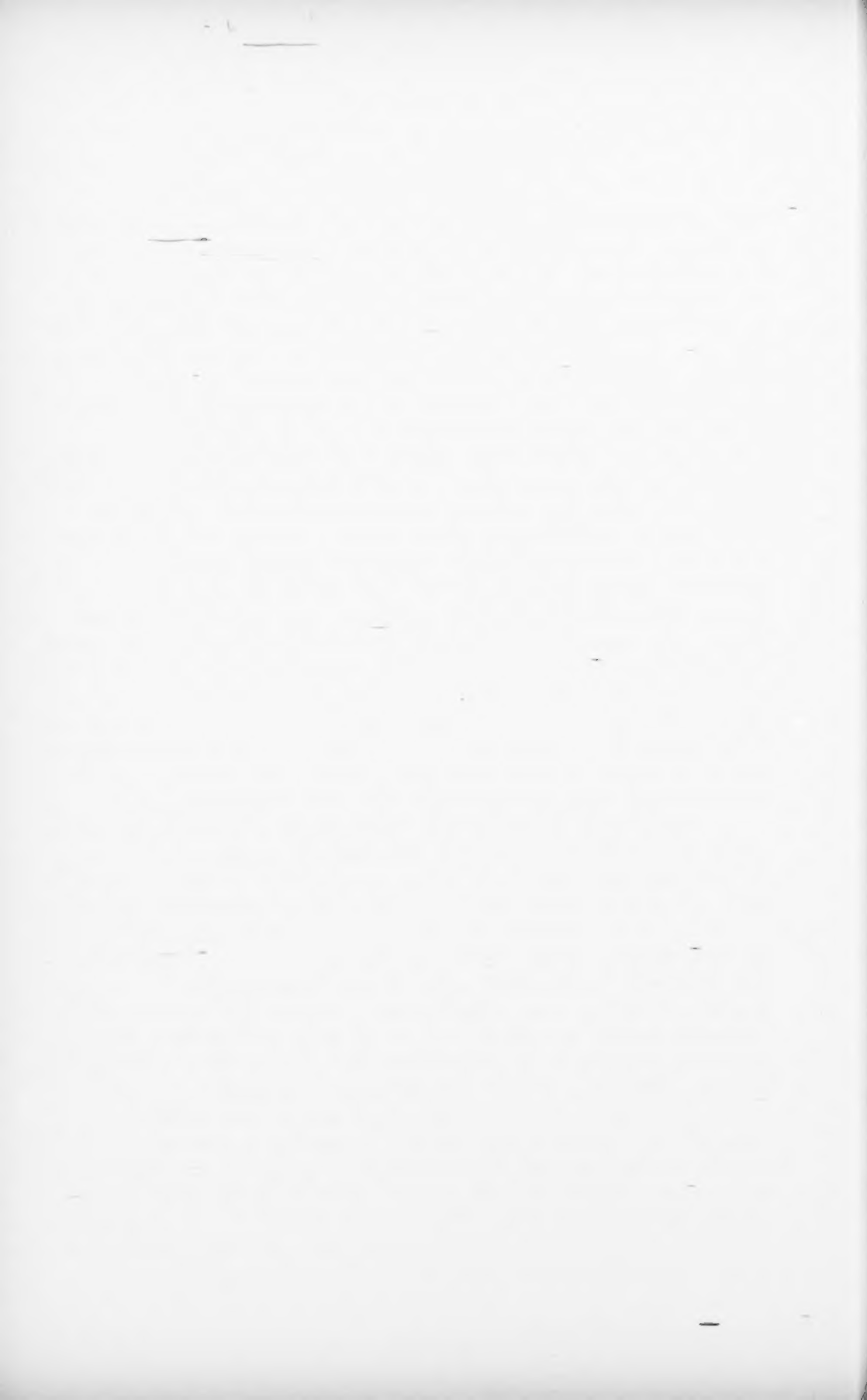


for previously. This letter shows an obvious attempt to make yet another false entry into my personnel file. This act also denied me an opportunity to rectify what UPS considered a previous problem. (see rehabilitation, OB-28. OB-21, A-122 lines 11-23, A-295 lines 20-25, A-296 lines 14-17). The day after I was "written-up" for throwing a package, ten-foot "jam-bars" were introduced in a training session so that the need for throwing packages would be alleviated. (OB-16 through 19, A-109).

It was my Union representative to whom Mr. Wald refers, a gentleman named Mr. Harmon Wilson, that told me to make sure that I pursue this issue with the anti-discrimination authorities. He also told me that he was discharged from UPS under the same type of phony, pretextual reasons as I, and it was the United States Court System that re-instated him to his position and guaranteed him upward mobility. He has since been placed into a full-time position and had been appointed the Assistant Union Steward.

UPS's articulated business reason to which Mr. Wald refers is based upon non-credible data. The entire argument that Mr. Wald cites here is a clear demonstration of pretext, set-ups, pencil-whippings, etc. Suspensions that should have never occurred, personnel file entries from temporary supervision, and memorialization of trivial issues such as getting a drink of water and untied shoes are examples of what Mr. Wald calls "articulated business reasons".

It is a fact that similarly situated Caucasian employees were treated more favorably than I for doing far worse things. Similarly situated Mark Caine committed "cardinal sins" that were observed by supervisors but were not documented. Mr. Caine was not fired, was not even disciplined for major infractions i.e.



intentional damage to packages, using abusive language directed at supervision (A-160), intentionally missorting large numbers of parcels, calling a work stoppage (walk-off -- "a cardinal sin"), etc. but it was me who was cited for insubordination of which I was not guilty. Yet, in Mr. Wald's words, discipline was uniformly applied.

Mr. Wald's "so-called" credible witnesses admit to unequal application of rules. (A-249 through 253).

On several occasions in the BIO, Mr. Wald again "twists" fact into self-serving testimony by attempting to say that Mr. Caine said that the disparate treatment that I received from UPS was not not racially motivated. IN ACTUALITY, MR. CAINE QUITE SIMPLY SAID THAT HE "COULD NOT READ MINDS". (RB-5, TR 141A).

Mr. Caine also testified that he on several occasions heard UPS managers refer to employees (never to their faces) as "niggers". (A-173, lines 14 through 18).

Keith Krug and Charles Park were guilty of cardinal sins (proven theft and dishonesty, stealing company time, and intentionally defrauding the company) yet both of these Caucasian gentlemen were retained and promoted, while at the same time I was fired on pretext.

Mark Caine admitted to intentionally missorting hundreds and hundreds of packages (at least 750 to be exact) on several different days because a supervisor "pissed him off". (A-170). Mr. Caine was retained for his deeds while I was fired for unintentionally missorting a minimal number of parcels (less than one percent). Yet to Mr. Wald, discipline was uniformly applied.

Another incidence of disparate treatment surrounded a chemical spill. When I was the only person exposed to dangerous chemical fumes, my missing work due to illness was



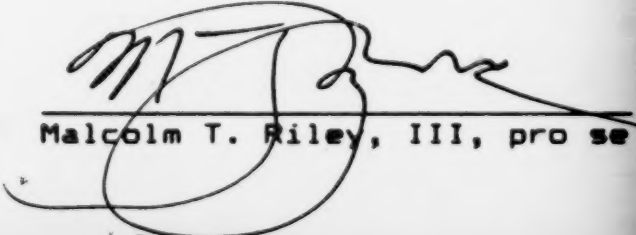
punished by an unpaid suspension in addition to unpaid sick days. Four months later, when I and my Caucasian co-workers were exposed to the same chemical, the result was excused sick days with pay for everyone exposed. (A-129 lines 18-25, A-130 lines 1 through 8, A-130 lines 9-25, A-164 lines 15-23, A-163 lines 1-14, A-327 through 329, A 35-38, A-54, A133 lines 15-25).

Mark Caine was the insubordinate employee--not me. Caine, Parks, and Krug were the employees who committed "cardinal sins" --not me. UPS repeatedly entered lies into my personnel file and "dressed them up in a misleading uniform" and used them as progressive discipline so that could discharge me for racially motivated reasons. Yet, I was fired and unemployed for three years, while my Caucasian counterparts were retained and promoted.

A center-level manager at UPS admitted in Court that he talks to employees before administering discipline so that an attempt to rectify the problem could be made. When asked if he did this in my (Mr. Riley's) case, his response was simply "No. I suspended him". (A-250, lines 8-18).

In conclusion, it is respectfully prayed that this Honorable Court grant my Petition for a Writ of Certiorari in the Interest of Justice.

Respectfully Submitted,



Malcolm T. Riley, III, pro se